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No. 84-164 (2)

In The

Supreme Court of the United States

October Term, 1983

BARRON COLLIER, d/b/a OZARK TROUT FARM,

Petitioner,

vs.

CITY OF SPRINGDALE AND THE SPRINGDALE WATER AND SEWAGE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an inverse condemnation or other taking of property by a municipal corporation, whether negligent or intentional is, under Arkansas law, without due process so that the act gives rise to an action under Title 42 U.S.C. §1983.

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Respondents City of Springdale and Springdale Water and Sewer Commission respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States District Court, Western District of Arkansas, Fayetteville Division, in *Barron Collier, d/b/a Ozark Trout Farm v. City of Springdale and the Springdale Water and Sewer Commission*, on February 12, 1983, is reproduced at Appendix I, page A-1 of the Petition. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on May 8, 1984, is reproduced at Appendix II, page A-16 of the Petition. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 5, 1984, is reproduced at Appendix III, page A-16, of the Petition.

JURISDICTION

The Court has jurisiction to review this matter pursuant to 28 U.S.C. §1254(1).

REASONS FOR DENYING WRIT

Petitioner has failed to support his allegations that the Eighth Circuit Court of Appeals has (a) decided an important question of federal law which has not been, but should be, settled by this Court and (b) has decided a federal question in a way that conflicts with applicable decisions of this Court.

Respondents, City of Springdale and Springdale Water and Sewage Commission, have no objections to the petitioner's "Statement of Case".

Respondents disagree with the argument put forth in petitioner's "Grounds for Allowance of Writ of Certiorari". Specifically, respondents urge that the petitioner has misconstrued the opinion of the Eighth Circuit Court of Appeals when he states "the U. S. Court of Appeals, in its opinion dated May 8, 1984, extended the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981) and found that the existence of a post-deprivation remedy barred petitioner from pursuing an action under 42 U.S.C. 1983."

The U. S. Court of Appeals, in footnote 4 of its opinion (at page A-21 of the Appendix to petitioner's petition) explained its position vis-a-vis *Parratt*: "we believe this reliance is misplaced. As we will demonstrate, the Supreme Court's rationale in *Parratt* further supports our conclusions in the present case. However, unlike *Parratt*, this case is more appropriately characterized as an unauthorized governmental 'taking' allegedly in violation of Collier's constitutional right to just compensation rather than a tortious deprivation of property in violation of rights to procedural due process. Thus, more directly on point is a distinct line of cases addressing the issue of federal jurisdiction over state inverse condemnation actions such as this." Actually, one is hard pressed to find other cases in which inverse condemnation or taking of property without due process has been held to be a Section 1983 Civil Rights action. In fact, early authority is to the effect that eminent domain is a state matter to be dealt with in state courts. *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403.

Likewise, the U. S. Supreme Court, in a line of procedural due process cases, has looked to the available state remedies to determine whether they afforded sufficient due process to satisfy the Constitution. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Ingraham v. Wright,* 430 U.S. 651 (1977). In these cases, the Court did not dismiss for failure to exhaust state remedies but rather dismissed on the merits because the available state remedies which complied with due process had not been followed.

While the Supreme Court has frequently found that some kind of prior hearing is necessary to guard against any arbitrary infringement of Fourteenth Amendment interests, those requirements are significantly lessened where the state has preserved what "had always been the law of the land". *United States v. Barnett,* 376 U.S. 681 (1964).

Post-deprivation hearings do not, per se, deprive one of due process. *Ingraham v. Wright,* 430 U.S. 651 (1977); *Ewing v. Mytinger and Casselberry,* 339 U.S. 594 (1950); *Fahey v. Mallonee,* 322 U.S. 245 (1947); *Bowles v. Willingham,* 321 U.S. 503 (1944); *Yakus v. United States,* 321 U.S. 414 (1944); *Phillips v. Commissioner,* 283 U.S. 589.

Arkansas, through its constitution and statutes, has provided a means of redress to any person deprived of property by an act of the state. Arkansas Constitution, Art. II, Section 22. Ark. Stat. Ann. §35-101. The Arkansas statute is sufficiently broad to cover petitioner's situation. It provides: "Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in

the Circuit Court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations and the measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property". [Act Apr. 11, 1893, No. 149, Section 1, p. 261; C.&M. Dig., §§3930, 3931, Pope's Dig., §§4931, 4932].

The purpose of this statute is to implement the necessary remedy to carry out the intent of Article II, Section 2 of the Arkansas Constitution which provides: "The right of property is before and higher than any constitutional sanctions; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor".

The protections guaranteed by the Arkansas Constitution have been used by Arkansas plaintiffs for decades to secure relief for damage caused by sewer discharges. *Sewer Improvement Dist. No. 1 of Sheridan v. Jones,* 199 Ark. 534, 134 S.W.2d 551 (1939); *Jones v. Sewer Improvement Dist. No. 3 of City of Rogers,* 119 Ark. 166, 177 S.W. 888 (1915); *City of El Dorado v. Scruggs,* 113 Ark. 239, 168 S.W. 846 (1914); *McLaughlin v. City of Hope,* 107 Ark. 442, 155 S.W. 910 (1913). More recently, the Supreme Court of Arkansas has upheld the intent of Ark. Const., Article II, Section 22, against rules of the Arkansas State Game and Fish Commission which were in opposition to the Constitution. *She'lnut v. Arkansas State Game and Fish Commission,* 222 Ark. 25, 258 S.W.2d 570 (1953).

The State of Arkansas has a compelling interest in the determination of the constitutionality of and the scope of its statutes by its own judiciary. In such circumstances, abstention from ruling in such cases or dismissal by the federal court is warranted in order that the state court be given an opportunity to resolve any conflict.

CONCLUSION

The question cited is neither new nor unique. The law regarding eminent domain is well settled and seldom successfully contested. There is no compelling reason why inverse condemnation actions should suddenly become a source for civil rights litigation.

The petition should be denied.

Respectfully submitted,

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